IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 13, 2009

THOMAS P. COLLIER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2006-A-792 Cheryl Blackburn, Judge

No. M2008-00917-CCA-R3-PC _ Filed October 9, 2008

On May 4, 2007, Petitioner, Thomas P. Collier, pled guilty in the Davidson County Criminal Court to second degree murder. Pursuant to the guilty plea, he pled out of his range as a Range II multiple offender and was sentenced to thirty-five years. On October 26, 2007, Petitioner filed a petition for post-conviction relief arguing that his plea was not entered voluntarily, intelligently, and knowingly as a result of ineffective assistance of counsel. After holding an evidentiary hearing, the post-conviction court denied the petition. On appeal, Petitioner argues that his plea was involuntary and his trial counsel was ineffective because Petitioner did not know he was pleading outside of his sentencing range. We have reviewed the record on appeal and conclude that the evidence does not preponderate against the findings of the post-conviction court. Therefore, we affirm the post-conviction court's denial and dismissal of the petition for post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the appellant, Thomas P. Collier.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; and Victor S. Johnson, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The State entered the following statement of fact at the plea colloquy:

> [I]f this case, which is 2006-A-792, had gone to trial, the State's proof would come primarily from three brothers; Marcus Beasley, Darryl Beasley, and Gregory Beasley, who have known the defendant for quite a period of time and are related to him in some manner as well as the defendant's statement to the police.
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> The testimony from these brothers would be that on January the 5th of 2006 [Petitioner] had a gun, was acting in an aggressive manner in his statements and indicating that he was going to rob somebody or going to shoot somebody that night. At about 1:45 a.m. in an alley off 27th Avenue North near Clifton the three brothers – or two of the brothers at least were out along with the defendant. And they came into contact with the victim, Ms. Lashelle . . . Stevenson, who they knew. [Petitioner] got into a verbal argument with Ms. Stevenson, as far as we can tell, over nothing more than areas of town which they came from or represented or something to that effect. In any event [Petitioner] with no more provocation than that pulled out his gun and shot Ms. Stevenson. She fell to the ground, and he walked over and shot her twice more in the head as she lay there on the ground.
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> The brothers went home and told their mom what had happened, and she got them to come down and tell the police what happened. While they were doing that [Petitioner] got in touch with the police and came down. And in his statement he really could not say exactly why he had done this, and he couldn't exactly say how many times he had shot her. But he did admit he did shoot her. This was here in Davidson County.

In March of 2006, the Davidson County Grand Jury indicted Petitioner for one count of first degree murder. On May 4, 2007, Petitioner entered a guilty plea to one count of second degree murder as a Range II multiple offender with a sentence of thirty-five years. Petitioner pleaded to a higher range pursuant to his plea agreement.

On October 26, 2007, Petitioner filed a petition for post-conviction relief. The post-conviction court held a hearing on the petition on March 19, 2008. Petitioner refused to testify at the hearing. The sole witness was trial counsel.

Trial counsel testified that he represented Petitioner at his guilty plea to second degree murder. Trial counsel was appointed counsel. He met with Petitioner between five and ten times in preparation for trial. When preparing for trial, trial counsel believed that the question was whether Petitioner would be convicted of first degree murder or second degree murder. He believed this to be the case because the facts were that the murder was the result of a fight in the street. It started as an argument and ended in a killing. Trial counsel recalled that he discussed the entry of the guilty plea with Petitioner either the night before or the day of the plea. Trial counsel did not specifically recall going over the plea petition with Petitioner, but he testified that it is his standard operating procedure to go over it. When shown the plea petition at the hearing, trial counsel testified that his

handwritten notes were on the document. Trial counsel could not recall a specific conversation with Petitioner that he was pleading out of his range, but trial counsel did remember a conversation with Petitioner's mother about Petitioner pleading out of range. Trial counsel also testified that he hired an investigator to interview witnesses. The case was set for trial, but trial counsel did not subpoena any witnesses. Trial counsel stated that he became aware about two weeks out that Petitioner was going to plead guilty, so he did not issue subpoenas for that reason. According to trial counsel, there were no grounds present to support a motion to suppress Petitioner's confession. Trial counsel was concerned about Petitioner's mental health and hired a psychiatrist from Vanderbilt University to examine Petitioner. The psychiatrist concluded that Petitioner was exaggerating or feigning his symptoms so that there was no conclusion about Petitioner's mental health.

On cross-examination, trial counsel testified that he had roughly six years of criminal defense experience and that he had tried some murder cases. He also stated that the main witnesses were Petitioner's cousins and there was basically no factual dispute as to the occurrence.

On April 8, 2008, the post-conviction court entered a written order dismissing and denying the petition. In this order, the post-conviction court specifically found trial counsel to be credible and that Petitioner failed to meet his burden to demonstrate by clear and convincing evidence that trial counsel was ineffective. Petitioner filed a timely notice of appeal.

ANALYSIS

On appeal, Petitioner argues that his trial counsel was ineffective and that his plea was not entered voluntarily, intelligently, and knowingly because he did not understand that he was pleading out of range for sentencing purposes.

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Effective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942

S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the post-conviction court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is *de novo*" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the State standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn.1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. *Pettus*, 986 S.W.2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904.

As stated above, Petitioner refused to testify at the post-conviction hearing. Therefore, the evidence presented consists of the transcript of the plea colloquy entered as an exhibit and trial counsel's testimony. The transcript of the plea colloquy shows that the trial court advised Petitioner that he was waiving his right to a Range I sentence and that he was pleading above his range to a Range II sentence. When asked if he was waiving any issues with regard to pleading above his range, Petitioner replied in the affirmative. At the plea colloquy, Petitioner also agreed that trial counsel had explained to him the effects on his sentence of pleading outside of his range. Petitioner also stated that he and trial counsel had thoroughly discussed his plea agreement, and they had reviewed the plea petition together. Trial counsel could not independently recall discussing with Petitioner the fact that he was pleading outside of his range. However, he did state that it was his standard operating procedure to go over all plea agreements with the defendants he represented. In addition, he did recall having a discussion with Petitioner's mother that Petitioner would be pleading out of range.

Petitioner has presented no affirmative evidence that he was not advised of the fact that he was pleading outside of his range. In fact, the facts presented at the post-conviction hearing point to the conclusion that he was indeed apprised of this fact. For this reason, we agree with the trial court's conclusion that Petitioner has not met his burden and find no evidence that preponderates against this conclusion by the post-conviction court.

For this reason, we conclude that Petitioner's plea was entered voluntarily, intelligently, and knowingly. We also conclude that trial counsel did not afford deficient representation, and even if the representation was deficient, Petitioner has not proven that he would not have pled guilty if not for trial counsel's representation.

CONCLUSION

For the foregoing reasons, we affirm the post-conviction court's denial and dismissal of the petition for post-conviction relief.

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JERRY L. SMITH, JUDGE